Tan Chiw Thoo v Tee Kim Kuay

FEDERAL COURT (KUALA LUMPUR) — SUPREME COURT CIVIL APPEAL NO 02-342-1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
20 NOVEMBER 1996

Land Law *— Indefeasibility of title and interests — Registration, priority of — Two registered owners for same piece of land — Absence of specified grounds under s 340 or any grounds of equity — Whether subsequent registered owner has good title — National Land Code 1965 s 340*

Land Law *— Alienation and incidents — Validity of — Alienation of land — Land already alienated was re-alienated to another party — Whether land which was no longer state land could be alienated*

Land Law *— Administration — Appeals and remedies — Power of Collector of Land Revenue — Whether decision by collector at enquiry was a decision appealable only under s 418 of the National Land Code 1965 — National Land Code 1965 ss 27 & 418*

Contract *— Consideration — Compromise agreement — Whether compromise agreement void for lack of consideration — Agreement was bona fide and not vexatious or frivolous*

Contract *— Void contract — Lack of consideration — Compromise agreement — Whether compromise agreement void for lack of consideration — Agreement was bona fide and not vexatious or frivolous*

Civil Procedure *— Res judicata — Decision of Collector of Land Revenue — Whether proper to be relitigated in the High Court — Whether amounts to res judicata — Whether parties ought to appeal the decision instead — National Land Code 1965 ss 27 & 418*

Two documents of title were issued for the same piece of land ('the lot'). The first title holder ('the respondent') was issued a document of title of the lot registered in September 1968 while the second title holder ('the appellant') was issued with another document of title for the lot in December 1972. The respondent claimed to be the registered owner of the lot alleging that the appellant had been in unlawful occupation of the lot. The appellant contended that he was the lawful owner by virtue of the document of title for the lot having been issued to him. An enquiry was held by the Collector of the Land Revenue ('the collector') pursuant to s 27 of the National Land Code ('the NLC') where both parties had signed an agreement to compromise their dispute ('the compromise agreement'). Under the terms of the compromise agreement, both parties would receive ½ undivided share of the lot and in addition, the respondent agreed to pay compensation in the sum of RM1,800 to the appellant because the latter had planted oil palm on the lot. Counsel for the appellant submitted that the compromise agreement was a decision appealable only under s 418 of the NLC and the further legal consequence was

that it amounted to an argument of res judicata that the matter should not be litigated in the High Court. A

The trial judge allowed the claim of the respondent and held that the respondent's document of title, having been registered earlier than that of the appellant, prevailed over that of the appellant. The judge further held that the compromise agreement was invalid because: B (i) the compromise agreement provided for the lot to be transferred to both parties in equal shares (½ undivided share each) contrary to s 214(1)(a) of the NLC, which provides that only the transfer of the whole and not part of any alienated land is capable of registration; and (ii) the compromise agreement was not registrable as an C 'instrument' under s 206(1)(b) of the NLC. It was also argued that the consideration for the compromise agreement was invalid or insufficient and therefore the appellant's claim was void and unenforceable.

Held, allowing the appeal: D

(1) The document of title of the appellant was void as against the respondent. The alienation of the lot which was state land had taken effect upon registration of the register of document of title to the respondent in September 1968. Such indefeasibility could only be defeated by any of the specified grounds under s 340 of E the NLC or any grounds of equity. In this case, no such ground existed. On another alternatively sufficient ground, apart from indefeasibility of title, it was void also as a document of title to land and therefore against the respondent also, because the lot could not be alienated by the state authority since it was no F longer State land (see pp 229I and 230A–B); *Pow Hing & Anor v Registrar of Titles* [1981] 1 MLJ 155 followed.

(2) The compromise agreement which was signed before the collector at the enquiry was not a decision appealable only under s 418 of the NLC; even if it were, it would not have amounted to res judicata. G

For the defence of res judicata or estoppel per rem judicatam to apply, the question of title as disputed between the parties must have been decided earlier in a court of competent jurisdiction. The enquiry held by the collector was not a court of competent jurisdiction because the collector had not been given such power H to adjudicate on such a dispute as to title under the NLC. The right of the collector (now the land administrator) to hold an enquiry under s 27 does not ipso facto confer on him the right to decide any matter or right whatsoever in connection with land. Therefore, the dispute to title in this case could be and was properly litigated in the court below (see pp 231E–F, 230I and I 231A–B).

(3) The compromise agreement was not invalid merely because it provided for the lot to be transferred to both parties in equal

shares. It has been the accepted conveyancing practice among solicitors for many years and such practice has been recognized and even adopted by the courts that it would be lawful that the respondent could execute a transfer of the lot to himself and to the appellant, each to take ½ undivided share of it in one memorandum of transfer.

Also, the argument that the compromise agreement was invalid because it was not registrable as an 'instrument' under s 206(1)(b) of the NLC was not acceptable as a non-registration under s 206(1)(b) does not affect any contractual operation of any transaction relating to alienated land or any interest therein (see pp 231H–I and 232A–C); *Paul Murugesu v Cheok Tok Gong & Ors* [1996] 1 MLJ 843 followed.

(4) The compromise agreement, on its true construction, was a compromise of the dispute between the parties on the lot. The consideration for the compromise was one's promise to refrain or forbear from litigating a claim in exchange for a compromise from the other of a promise to give up a bit or part of that which the promisor claims.

So long as the claim in a compromise agreement is not frivolous or vexatious even though it is doubtful, and subject to an absence of mala fides, such a claim will make the consideration for the compromise agreement valid or sufficient. In this case, the claim by the appellant to be the rightful proprietor of the lot — and the similar claim by the respondent — could not be said to be frivolous or vexatious as both had the document of title to the lot at the time of the signing of the compromise agreement. That being the case, the consideration for the compromise agreement was valid or sufficient and it was binding and enforceable (see pp 232D, F, 233G–I and 235A); *Miles v New Zealand Alford Estate Co* (1886) 32 Ch D 266, *Callisher v Bischoffsheim* (1869–1870) 5 LRQB 449, *Tinsukia Municipal Board v Harikissen* 1957 AIR Assam 10 and *United Provinces Government v Church Missionary Trust Association Ltd* AIR 1948 Orissa 54 followed.

[Bahasa Malaysia summary

Dua dokumen hakmilik telah dikeluarkan untuk sebidang tanah yang sama ('lot tersebut'). Pemegang hakmilik pertama ('penentang') telah dikeluarkan suatu dokumen hakmilik lot tersebut yang didaftarkan dalam bulan September 1968 sementara pemegang hakmilik kedua ('perayu') dikeluarkan dengan satu lagi dokumen hakmilik untuk lot tersebut dalam bulan Disember 1972. Penentang menuntut bahawa dialah tuan punya berdaftar lot tersebut dengan mengatakan bahawa perayu telah menduduki lot tersebut dengan menyalahi undang-undang. Perayu berhujah bahawa dia adalah tuan punya yang sah memandangkan dokumen hakmilik untuk lot tersebut yang telah dikeluarkan kepadanya. Siasatan diadakan oleh Pemungut Hasil Tanah ('pemungut') menurut s 27 Kanun Tanah Negara 1965

('KTN') di mana kedua-dua pihak menandatangani suatu perjanjian untuk mencapai kompromi atas pertikaian mereka ('perjanjian kompromi'). Di bawah terma perjanjian kompromi, kedua-dua pihak akan menerima ½ bahagian yang tidak dibahagikan dalam lot tersebut dan tambahan pula, penentang bersetuju membayar pampasan dalam jumlah RM1,800 kepada perayu kerana perayu telah menanam kelapa sawit atas lot tersebut. Peguam perayu berhujah bahawa perjanjian kompromi adalah suatu keputusan yang hanya boleh dirayu di bawah s 418 KTN dan akibat undang-undang yang selanjutnya adalah bahawa perkara itu sama seperti hujah res judicata bahawa perkara itu tidak patut dibicarakan di Mahkamah Tinggi.

Hakim perbicaraan membenarkan tuntutan penentang dan memutuskan bahawa disebabkan dokumen hakmilik penentang didaftarkan lebih awal daripada dokumen hakmilik perayu, ia mengatasi dokumen hakmilik perayu. Hakim selanjutnya memutuskan bahawa perjanjian kompromi adalah tak sah sebab: (i) perjanjian kompromi memperuntukkan lot tersebut dipindahmilik kepada kedua-dua pihak dalam bahagian yang sama rata (½ bahagian yang tidak dibahagikan seorang) bertentangan dengan s 214(1)(a) KTN, yang memperuntukkan bahawa hanya pindahmilik keseluruhan dan bukan sebahagian daripada mana-mana tanah yang diberimilik boleh didaftarkan; dan (ii) perjanjian kompromi tidak boleh didaftarkan sebagai suatu 'instrumen' di bawah s 206(1)(b) KTN. Ia juga dihujahkan bahawa balasan untuk perjanjian kompromi adalah tak sah atau tidak mencukupi dan oleh itu tuntutan perayu adalah terbatal dan tidak boleh dikuatkuasakan.

Diputuskan, membenarkan rayuan:

(1) Dokumen hakmilik perayu adalah terbatal terhadap dokumen hakmilik penentang. Pemberimilikan lot tersebut yang merupakan tanah negeri telah berkuatkuasa pada pendaftaran dokumen hakmilik kepada penentang dalam bulan September 1968. Ketakbolehan disangkal sedemikian hanya boleh ditewaskan melalui mana-mana daripada alasan yang dinyatakan di bawah s 340 KTN atau mana-mana alasan ekuiti. Dalam kes ini, tiada alasan sedemikian wujud. Atas satu lagi alasan alternatif yang mencukupi, selain daripada ketakbolehan disangkal hakmilik, ia adalah terbatal juga sebagai dokumen hakmilik tanah dan dengan itu terhadap penentang juga, sebab lot tersebut tidak boleh diberimilik oleh pihak berkuasa negeri oleh kerana ia tidak lagi merupakan tanah negeri (lihat ms 229I dan 230A–B); *Pow Hing & Anor v Registrar of Titles* [1981] 1 MLJ 155 diikut.

(2) Perjanjian kompromi yang ditandatangani di hadapan pemungut di siasatan bukanlah keputusan yang hanya boleh dirayu di bawah s 418 KTN; jikapun ia adalah keputusan demikian, ia tidak akan sama seperti res judicata.

Supaya pembelaan res judicata atau estopel per rem judicatam terpakai, soalan hakmilik seperti yang dipertikaikan antara pihak-pihak mestilah diputuskan terlebih dahulu dalam mahkamah

A yang mempunyai bidang kuasa kompeten. Siasatan yang diadakan oleh pemungut bukanlah mahkamah yang mempunyai bidang kuasa kompeten kerana pemungut tidak diberikan kuasa untuk menghukum atas pertikaian yang berkaitan dengan hakmilik di bawah KTN. Hak pemungut (kini digelar pentadbir tanah) untuk B mengadakan siasatan di bawah s 27 tidak secara ipso facto mengurniakan ke atasnya hak untuk menentukan sebarang perkara atau apa-apa hak yang berkaitan dengan tanah. Oleh itu, pertikaian hakmilik dalam kes ini boleh dan telah dibicarakan dengan wajarnya di mahkamah bawah (lihat ms 231E–F, 230I dan 231A–B).

C (3) Perjanjian kompromi bukanlah tak sah semata-mata kerana ia memperuntukkan lot tersebut dipindahmilik kepada kedua-dua pihak dalam bahagian yang sama rata. Sudah lama menjadi amalan pemindahhakan yang diterima di kalangan peguamcara dan amalan demikian telah dikenal pasti dan diterima-pakai oleh D mahkamah bahawa adalah sah bahawa penentang boleh melaksanakan pindahmilik lot tersebut kepada diri sendiri dan kepada perayu, setiap dari mereka mengambil ½ bahagian yang tidak dibahagikan dalam satu memorandum pindahmilik.

Juga, hujah bahawa perjanjian kompromi adalah tak sah kerana ia tidak boleh didaftarkan sebagai suatu 'instrumen' di bawah E s 206(1)(b) KTN tidak boleh diterima sebab ketakpendaftaran di bawah s 206(1)(b) tidak menjejaskan mana-mana operasi kontraktual sebarang transaksi yang berhubung dengan tanah yang diberimilik atau apa-apa kepentingan di dalamnya (lihat ms 231H–I dan 232A–C); *Paul Murugesu v Cheok Tok Gong & Ors* [1996] 1 MLJ 843 diikut. F

(4) Perjanjian kompromi itu, pada tafsiran sebenar, adalah satu kompromi pertikaian di antara pihak-pihak atas lot tersebut. Balasan untuk kompromi adalah janji seseorang untuk menahan diri supaya tidak membuat litigasi atas tuntutan sebagai balasan kompromi daripada seorang yang lain. G

Selagi tuntutan dalam perjanjian kompromi tidak remeh atau menyusahkan walaupun ia meragukan, dan tertakluk kepada ketiadaan mala fide, tuntutan sedemikian akan membuat balasan untuk perjanjian kompromi sah atau mencukupi. Dalam kes ini, tuntutan oleh perayu bahawa dialah tuan punya berdaftar lot H tersebut — dan tuntutan yang serupa oleh penentang — tidak boleh dikatakan remeh atau menyusahkan kerana kedua-duanya mempunyai dokumen hakmilik kepada lot tersebut pada masa perjanjian kompromi ditandatangani. Dalam keadaan kes, balasan untuk perjanjian kompromi adalah sah atau mencukupi dan ia I adalah mengikat dan boleh dikuatkuasakan (lihat ms 232D, F, 233G–I dan 235A); *Miles v New Zealand Alford Estate Co* (1886) 32 Ch D 266, *Callisher v Bischoffsheim* (1869–1870) 5 LRQB 449, *Tinsukia Municipal Board v Harikissen* 1957 AIR Assam 10 dan *United Provinces Government v Church Missionary Trust Association Ltd* AIR 1948 Orissa 54 diikut.]

Notes

For cases on indefeasibility of title and interests, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1837–1896.
For cases on alienation and incidents, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1377–1398.
For cases on administration of land, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1310–1339.
For cases on consideration of contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1358–1380.
For cases on void contract, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2295–2310.
For cases on res judicata, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2892–2939.

Cases referred to

American Cyanamid Co v Ethicon Ltd [1975] AC 396 (refd)
Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hjh Salma bte Mohd Jamin) [1989] 1 MLJ 381 (refd)
Callisher v Bischoffsheim (1869-1870) 5 LRQB 449 (folld)
Land Executive Committee of the Federal Territory v Sykt Harper Gilfillan Bhd [1981] 1 MLJ 234 (refd)
Miles v New Zealand Afford Estate Co (1886) 32 Ch D 266 (folld)
Paul Murugesu v Cheok Tok Gong & Ors [1996] 1 MLJ 843 (folld)
Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155 (folld)
Tham Kong v Oh Hiam & Ors [1968] 1 MLJ 44 (refd)
Tinsukia Municipal Board v Harikissen AIR 1957 Assam 10 (folld)
United Provinces Government v Church Missionary Trust Association Ltd AIR 1948 Orissa 54 (folld)

Legislation referred to

Land Code 1926 s 107(i)
National Land Code 1965 ss 27, 206(1)(b), 206(3), 214(1)(a), 340, 340(3), 418
Rules of the High Court 1980 O 18 r 19(1)(b)
Subordinate Courts Act 1948 ss 70(4), 71

Appeal from: Civil Suit No F22 of 1982 (High Court, Kuala Lumpur)

Zainur Zakaria (*Zainur Zakaria & Co*) for the appellant.
Karpal Singh (*Karpal Singh & Co*) for the respondent.

Cur Adv Vult

Peh Swee Chin FCJ (delivering the judgment of the court): At times, one cannot resist a pun, thus, this case is not 'A Tale Of Two Cities' but a tale of two documents of title for a piece of land, being State land prior to the issue of the earlier of the two documents of title, and being also Lot No 1898,

A Mukim Ijok, Daerah Kuala Selangor, due no doubt to some bureaucratic bungling. Lot No 1898 is hereafter referred to as 'the lot'.

The respondent herein ('the first title holder'), was issued with a document of title of the lot registered in September 1968 (exh AB-1) while the appellant herein ('the second title holder'), was issued with another B document of title for the lot also, registered in December 1972. The two different dates of registration for the two documents of title are significant, for legally, any alienation of State land shall take effect only upon the registration of a document of title thereto. The first title holder's document of title was registered earlier.

C The first title holder caused to be issued a writ against the second title holder, claiming to be the registered owner of the lot, alleging that the second title holder had been in unlawful occupation of the lot. The first title holder claimed vacant possession of the lot and a sum of RM60,000 being loss of income for 10 years at RM500 per month. The pecuniary claim was unexplained in the statement of claim, neither was it D particularized.

The statement of defence of the second title holder said that he was the lawful owner by virtue of the document of title for the lot having been issued to him and, therefore was not obliged to comply with the request to vacate the said land.

E It is crystal clear from the evidence that the case below was conducted by both parties for the purpose of resolving a dispute to the ownership to the lot without any serious question of facts. Learned counsel for the first title holder submitted that the first issue was whether the first title holder had better title to the lot (p 49 of the appeal record) and his opposing counsel likewise submitted so (p 76 of the appeal record). Faced with such F evidence and submissions, the court below correctly directed itself that the first issue to be decided was the question as to who had a better title to the lot.

From the nature of the whole case, it savours of nothing but a claim by each party to the entitlement to the lot to the exclusion of the other, and G not just a claim for possession. It is to be borne in mind that the dispute between the parties to the lot has been simmering for a long time for the learned trial judge referred also to the evidence of the second title holder having started work on the lot some time near 1965 and having been disturbed some three months later by people sent by the first title holder.

H The learned trial judge held allowing claim of the first title holder, that the first title holder's document of title, having been registered earlier than that of the second title holder, prevailed over that of the second title holder. Judgment was so given by the learned judge despite an earlier alleged compromise by both parties of their dispute in the form of an agreement in writing, which the learned trial judge found to be invalid. I More about this later.

The parties have so clearly wanted a just determination of their long-standing dispute, yet the nature of pleadings would appear to suggest a claim for possession of land, and by clear implication, on the basis of trespass, and a resistance to such claim on the basis of lawful occupation.

If parties had wanted the court to take them off from the boil of their dispute as to ownership of the lot, the pleadings have failed to make that clear, by failing to claim, for example, a suitably worded declaration that so-and-so is the sole rightful owner etc.

It was with some trepidation when we began to hear the present appeal. At the outset of the hearing, we enquired of both learned counsel, to the effect, as to whether they wanted the court to hear the appeal on the same basis of the learned trial judge in resolving the claim for ownership of land and with consequential orders and directions if necessary as the pleadings were defective in failing to make this clear. Both learned counsel replied to the effect that they wanted this court to do so. With the pleadings point thus out of the way, we proceeded to hear them on merits so as to do justice between the parties, justice which almost eluded them on account of their incomplete pleadings.

It is only necessary to recapitulate some parts of the relevant evidence.

The second title holder said when the first title holder sent people to disturb his possession of the land on which he had worked, he complained to the land office in 1965, twice for that year. To cut the story short, consequently, it cannot be disputed too, that the then Collector of Land Revenue of Kuala Selangor then issued a notice of an enquiry dated 23 June 1972 to be held on 6 July 1972 before him. It was issued pursuant to s 27 of the National Land Code 1965 ('the Code'). Both parties were later asked at a resumed enquiry to settle the matter on 22 August 1972. On 22 August 1972, both parties herein signed an agreement to comprise their dispute in the presence of the collector. This agreement ('the compromise agreement') is set out below:

> Kami, Tan Chiw Thoo, KP No 5679525 dan Tee Kim Kuay, KP No 5679644, yang tinggal di Simpang Ijok, dengan ini bersetuju menerima ½ bahagian daripada Lot 2 1898 dan PT 13, Mukim Ijok sebagaimana yang telah ditetapkan oleh Pemungut Hasil Tanah, Kuala Selangor pada hari ini dan En Tee Kim Kuay akan membayar sagu hati sebanyak RM1,800 kepada Tan Chiw Thoo pada 15 September 1972 di hadapan Pemungut Hasil Tanah, Kuala Selangor.

Under the terms of the compromise agreement, each of the parties herein would get a ½ undivided share of the lot, and in addition, the first title holder agreed to pay compensation in the sum of RM1,800 to the second title holder because, even according to the evidence of the first title holder, the second title holder had planted oil palm on the lot.

The first title holder said in evidence he was asked to sign it and to him, he said it was not possible that he would pay RM1,800 and hand over part of the land to the second title holder. He said he could not remember whether he accepted the compromise agreement or not.

The second title holder said the compromise agreement was signed before the collector after agreement to it was reached by both parties.

The first title holder had not up to date of trial paid anything to account of the sum of RM1,800 to the second title holder; and it must have, to the latter, added insult to injury when the learned trial judge

A ordered him to pay, instead, a sum of RM60,000 as damages together with interest to the first title holder.

The argument before us was centred on the validity of the compromise agreement which the learned trial judge held to be void.

Learned counsel for the second title holder argued before us that the
B learned trial judge was wrong in the conclusion aforesaid because the compromise agreement was a 'decision', by the collector, the emphasis for it having been a decision came from the words 'ditetapkan', ie 'decided' in the passive voice. If the first title holder was unhappy with the decision, he should have appealed against it under s 418 of the Code, but he did not do
C so. The learned trial judge had failed to consider this at all.

It was further submitted for the second title holder that the collector had power to adjudicate in the dispute as to land in an enquiry under s 27 of the Code.

It was further submitted for the second title holder that the civil suit
D of the first title holder was therefore wrong, and for this, he relied on *Land Executive Committee of the Federal Territory v Sykt Harper Gilfillan Bhd* [1981] 1 MLJ 234.

On the other hand, it was submitted for the first title holder that the collector had no power to adjudicate in dispute to land; and that the enquiry under s 27 of the Code could only be held on an order of the
E court, and in the absence of such a court order, only according to the provisions of the Code. Since the enquiry was not held on either of the grounds, the compromise agreement was not a decision appealable only under s 418 of the Code. Counsel further submitted with his usual candour, in reply to a question from the court, that the first title holder was bound
F 'technically' by the agreement without prejudice to his contention that it was invalid.

The main ground of the learned judge which did not seem to have drawn any flak from learned counsel was that the document of title for the lot that was issued earlier to the first title holder, had prevailed over the
G one that was issued to the second title holder on the ground of indefeasibility of title under s 340 of the Code. Learned counsel for the second title holder concentrated his argument instead on the compromise agreement signed subsequently by both parties herein before the collector. More about this later.

H The learned trial judge, on the question of indefeasibility of title correctly relied on s 340 of the Code and *Bank Bumiputra Malaysia Bhd v Mahmud bin Hj Mohd Din (Datin Hjh Salma bte Mohd Jamin, Intervener)* [1989] 1 MLJ 381. Alienation of the lot which was State land had taken effect upon registration of the register document of title to the first title holder in September 1968. Such indefeasibility of title can only be defeated
I by any of the specified statutory grounds of fraud, etc under s 340 or other grounds of equity, see for example, *Tham Kong v Oh Hiam & Ors* [1968] 1 MLJ 44. None of such statutory grounds or other grounds of equity relating to the issue of the document of title to the first title holder exists. The indefeasibility of title for the first title holder cannot be challenged.

Clearly, it follows that the document of title of the second title holder is void against that of the first title holder. On another alternatively sufficient ground, apart from indefeasibility of title, it is void also as a document of title to land, and therefore against the first title holder also, because the lot could not be alienated by the state authority, since it was no longer State land. To alienate it in these circumstances would be a wanton disregard of the express statutory provisions which provide for alienation only of State land such that it would amount to a failure to observe the mandatory statutory provisions of the Code. See *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155 (FC). The purported alienation to the second title holder was a nullity, in our opinion, to such an extent on the facts of this case, that had there been a purchaser in good faith and for valuable consideration of the title of the second title holder, for the sake of illustration, such a purchaser would have obtained neither title nor interest of the lot, in other words, the proviso to sub-s (3) of s 340 of the Code would not apply to assist such a purchaser.

The court will consider making the necessary consequential directions for the cancellation of the second title holder's document of title later, in order to provide, at least, an orderly realty market for the lot.

The issue of indefeasibility of title mentioned above has yet to determine this case, there remains the main contention of the parties in relation to the compromise agreement.

On the factual side, the first title holder could not deny having signed the compromise agreement and his attempt in evidence to resile from it was so feeble as to border on the ludicrous. In our view, he is bound by it. The learned trial judge, by touching on its validity from a purely legal aspect, could have come to the same view, though not in so many words.

On the legal aspect of the compromise agreement, in one respect, we must first of all stress that there has not been any suggestion that consent of either of the parties to the compromise agreement had been vitiated by any coercion, or undue influence, or fraud or misrepresentation or mistake. Rather, the suggestion has been that the compromise agreement is invalid or unlawful in other ways, apart from the implicit acknowledgement of both parties of the consent to the compromise agreement being free in the sense just stated.

Learned counsel for the second title holder argued on the assumed basis that the agreement was valid, that the agreement was a decision appealable only under s 418 of the Code, but his opponent in court submitted to the contrary. We do not set great store by this argument. Even if the agreement that was reached before the collector amounted to a decision under the Code, though we are unable to agree, the further legal consequence is that it amounts to an argument of res judicata that the matter could not be relitigated in the High Court below, such argument is not tenable.

Now, one of the conditions for the defence of res judicata or estoppel per rem judicatam is that the question of title as disputed between the parties must have been decided earlier in a court of competent jurisdiction.

We do not think the enquiry held by the collector is a court of competent jurisdiction because the collector had not been given such power to adjudicate on such a dispute as to title under the Code. Further, the right of a collector (now designated as a land administrator under the Code) to hold an enquiry under s 27 does not ipso facto confer on him the right to decide any matter or right whatsoever in connection with land. Power or jurisdiction, generally, must be express in, or implied irresistibly from any legislation and is not to be inferred lightly from it. For illustration, under the old Land Code of 1926, s 107(i) provided a very limited jurisdiction to the collector to decide possibly the question of title, as follows:

> Any person asserting that he has a right otherwise than by succession to a deceased proprietor or by virtue of an agreement of sale to be registered in the mukim register as the proprietor of or as having an interest in land held under entry in the mukim register may, if the value of the land does not exceed RM3,000, apply to the Collector for an order that such memorial shall be made upon the entry in the mukim register as shall register him as such proprietor or as having such interest.

This right in that section was taken away by the present Code which has not re-enacted in any form that old s 107. It should be a sobering thought in this connection that even a sessions court whose civil jurisdiction in non-motor collision cases is up to RM250,000 has no right to determine any dispute to land (s 70(4) of the Subordinate Courts Act 1948) except with consent of all parties in dispute (s 71, ibid).

We hold that the agreement which was signed before the collector at the enquiry is not a decision of the collector on the dispute to title, and even if it were, it would not have amounted to res judicata. We hold further that the dispute to title in this case could be and was properly litigated in the court below.

Learned counsel for the second title holder said that the compromise agreement was valid while learned counsel for the first title holder argued that it was invalid. The learned trial judge held that it was invalid for two reasons set out below.

The first reason was s 214(1)(a) of the Code, which provides that only the transfer of the whole and not part of any alienated land is capable of registration under the Code. In this case, the compromise agreement provided for the lot to be transferred to both parties in equal shares (½ undivided share each).

However, it has been the accepted conveyancing practice among solicitors for many years and such practice has been recognized and even adopted by the courts, that it would be lawful, using the agreement for illustration, that the first title holder can execute a transfer of the lot to himself and to the second title holder, each to take ½ undivided share of it in one memorandum of transfer. Thus in *Paul Murugesu v Cheok Tok Gong & Ors* [1996] 1 MLJ 843 at p 855, the Federal Court referred to this and explained and approved it.

We therefore dissent, with respect, from the first reason of the learned trial judge.

The second reason of the learned trial judge for the conclusion that the compromise agreement was invalid was that the compromise agreement was not registrable as an 'instrument' under s 206(1)(b) of the Code which provides that no 'instrument' affecting any dealing shall operate to transfer the title to any land, etc unless it has been registered under the provisions in connection with 'dealings' of land.

With respect, we are unable also to agree to this reasoning which is, inter alia, oblivious of sub-s (3) of the same s 206 of the Code which provides:

> Nothing in sub-s (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

For our part, we share the same view of the learned counsel for the second title holder that the compromise agreement was valid but for the following reasons.

The compromise agreement, on its true construction, is a compromise of the dispute between the parties herein about the lot. Such a compromise is often linked up with the question of the validity of the consideration for such a compromise, viz the question of 'sufficiency' of consideration. It must be remembered that 'sufficiency' of consideration is different, in law, from the 'adequacy' of consideration, though any dictionary may show both words to bear the same meaning. In law, the courts will often enquire into the 'sufficiency' but not the 'adequacy' of consideration, 'sufficiency' in law is synonymous with 'validity' in regard to consideration.

A compromise of a dispute is always in the forefront of a disputed transaction with a background of a pending, or on-going or even an unspoken likelihood of litigation, such that parties would resort to a law court should the negotiation for a compromise fail. The consideration for such a compromise is often therefore one's promise to refrain or forbear from litigating a claim in exchange for a promise from the other to give up a bit of or part of that which the former promisor claims.

Now, if the claim is actually good and enforceable, the consideration is no doubt sufficient or valid. If such a claim, on the other hand, is a doubtful one, the consideration is still valid or sufficient, and this position owes much, inter alia, to the dictum of Bowen LJ in *Miles v New Zealand Alford Estate Co* (1886) 32 Ch D 266 at p 291 as follows:

> It seems to me that if an intending litigant bona fide forbears a right to litigate a question of law or fact which is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong. It seems to me, it is equally a mistake to suppose that it is not sometimes a disadvantage to a man to have to defend an action even if in the end he succeeds in his defence; and I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession. Otherwise, you would have to try the whole cause to know if the man had a right to compromise it, and with regard to questions of law, it is obvious you could never safely compromise a question of law at all.

A The words, 'bona fide' in the above passage according to decided cases, either refer to the conduct of the parties in question, eg 'the promisor bona fide believed ...' or the integrity of a compromise, eg 'bona fide dispute'. These cases do not elaborate their nature and it is apt to cause a great deal of vagueness. After anxious consideration, we are of the view that the words, 'bona fide' should be read to mean that the 'consent' that leads to B a compromise agreement has not been vitiated by fraud, etc as mentioned earlier in connection with free consent to an agreement and that would incidentally be a sense, though broader, but more definitive than the traditional meaning of the words 'bona fide' in the absence of either fraud or unfair dealing. Such meaning is consonant with the unspecified but C clear spirit in which the words have been used by judges in the past in connection with such bona fides the absence of which would make a compromise agreement unenforceable or not genuine. Further, fraud, coercion, etc are the kinds of conduct which if proved, would vitiate any agreement so as to make it unenforceable.

D The words 'vexatious or frivolous' in the above passage from Bowen LJ should, in our view, have the meanings always known to lawyers in the sense as understood or applied by the courts: (a) in relation to O 18 r 19(1)(b) of the Rules of the High Court 1980 where a court may strike out any pleading, writ, etc on the ground that they are '... frivolous or vexatious'; and (b) in relation to Lord Diplock's use of the expression, ie E 'not being frivolous or vexatious' in contrast with the requirement of 'a serious question for trial', when giving the guidelines on a court's approach to an application by an applicant for an interlocutory prohibitory injunction in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. We further think that the sense used in relation to (a) is a better guide for the present F purpose than the sense used in relation to (b) because we venture to suggest that Lord Diplock used the expression, 'not being frivolous or vexatious' as an unduly sharp contrast for purpose of illustration of 'a serious question for trial' as if the 'serious question' were on one extreme end of a spectrum while a 'frivolous or vexatious' question on the other.

G In other words, so long as the claim in a compromise agreement is not frivolous or vexatious, even though it is doubtful, and subject to an absence of mala fides explained earlier, such a claim will make the consideration for the compromise agreement valid or sufficient. Examples of such a frivolous or vexatious claim are a gaming debt, or a claim which is clearly statute-barred and there are others, of course.

H Applying what has been stated to the facts in the instant case, the claim by the second title holder to be the rightful proprietor of the lot and for that matter, the similar claim of the first title holder, could not be said to be frivolous or vexatious as both had the document of title to the lot at the time of signing the compromise agreement, and it must have appeared I that it was even more 'rightful' for the first title holder whose document of title was registered earlier after the alienation of the lot. It was, in the circumstances of the case, certainly not a vexatious or frivolous claim on the part of the second title holder in view also of other following circumstances in this case. The second title holder had worked on the land since about 1965 and the oil palm cultivated on the land came from his

sweat and possibly tears. He said the collector or his State assemblyman all gave their ears to him also, probably with a great deal of sympathy. His claim, therefore, was at worst a doubtful claim, but certainly not frivolous or vexatious. All these circumstances could not have been lost in the mind of the first title holder who must have found the circumstances persuasive enough for him to sign the compromise agreement.

We ought to deal with another aspect of this case before we give our judgment. We have in fact, held that the document of title of the first title holder prevails over that of the second title holder on that ground of indefeasibility of title, etc. This means, in fact, that the court has found the claim of the second title holder to be the rightful proprietor (by virtue of his document of title) to be unfounded or without legal basis. The question then arises as to whether this finding affects the validity of the compromise agreement. In our view, it matters not that the claim of the second title holder is now found to be unfounded in law, so long as his claim was not vexatious or frivolous at the time of the signing of the compromise agreement, even though it was doubtful; the said compromise agreement would still be valid and binding. Thus in *Callisher v Bischoffsheim* (1869–1870) 5 LRQB 449, the plaintiff in that case believed he had a valid claim for £600 against the Government of Honduras and threatened to sue. The defendant agreed to deliver certain securities to the plaintiff in consideration of the plaintiff forbearing from taking such proceedings. The defendant failed to deliver them and it was found that no money was due to plaintiff from the Honduras Government. It was argued that a groundless action afforded no consideration for the promise to deliver the securities to the plaintiff. Judgment was given to the plaintiff. Cockburn CJ, with whom the other three judges agreed, said (at pp 451–452):

> Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could a compromise be enforced. Every day, a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue, he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexatious incident to it. The defendant's contention is unsupported by authority.

This case was considered by Bowen LJ aforesaid, who himself referred to such a similar situation in his passage cited above.

There are two Indian cases in similar vein fortifying the same proposition, see *United Provinces Government v Church Missionary Trust Association Ltd* AIR 1948 Orissa 54 and *Tinsukia Municipal Board v Harikissen* AIR 1957 Assam 10.

A We therefore hold that the consideration for the compromise agreement was valid or sufficient, and it is binding and enforceable.

We therefore allow the appeal, set aside the order of the court below dated 23 June 1993 and make a further order that:

(1) this court declares that the document of title of the respondent, ie B HS (M) 64, Lot No 1898, Mukim Ijok, Daerah Kuala Selangor, State of Selangor is valid and lawful while that of the appellant, ie HS(M) 426, Lot No 1898, Mukim of Ijok, Daerah Kuala Selangor, State of Selangor is void and a nullity;

(2) that the document of title registered in the name of the appellant be C surrendered by the appellant to the Land Administrator of the District of Kuala Selangor within a month from today for cancellation;

(3) that the Land Administrator of the District of Kuala Selangor do make all the necessary and sufficient memorials to effectuate such cancellation;

D (4) this court further declares that the agreement dated 22 August 1972 made by the parties herein is binding and enforceable;

(5) that the respondent do execute a valid and registrable transfer of ½ undivided share of Lot No 1898 in favour of the appellant aforesaid at the cost and expense of the appellant within a month from today E and also deliver the document of title in his name for the purpose of the transfer also within a month from today, failing which, a deputy registrar of the Federal Court be and is hereby authorized to execute such a valid and registrable transfer for and on behalf of the respondent, and in the event of failure to deliver the document of title, that the appellant be at liberty to apply for leave to file an F application for order of committal against the respondent;

(6) that within one month from today the respondent do further pay a sum of RM1,800 to the appellant with interest at 4% pa thereon from 15 September 1972 to date of payment; and

(7) that the respondent herein do pay costs of this appeal but that there G would be no order as to costs in the court below.

Appeal allowed.

Reported by Eugene Lee Hong Whye

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